IN THE

Supreme Court of the United States

November Term, 1977

No. 77-735

ALBERT ANZALONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Albert Anzalone, the defendant and petitioner herein, petitions this Court and respectfully prays that a writ of certiorari issue to review a judgment of conviction of the United States Court of Appeals for the Second Circuit entered August 8, 1977, which affirmed in part and reversed in part the judgment of conviction entered in the United States District Court for the Eastern District of New York, after a trial before the Hon. Edward Neaher and a jury.

Defendant, Anzalone, was convicted of violations of 42 U.S.C. Sec. 3631 and 18 U.S.C. 1623. The Court of Appeals

affirmed the conviction on the false declaration count and reversed the conviction under the Fair Housing Law (42 U.S.C. Sec. 3631). A motion made for rehearing by the defendant-appellant on the false declaration count was denied by the Court of Appeals on October 14, 1977. The mandate was issued on October 20, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit on appeal from trial before Hon. Edward Neaher, District Judge, Eastern District of New York, and a jury is included in Appendix A.

The opinion of the United States Court of Appeals for the Second Circuit granting the United States' motion for rehearing is included in Appendix B.

JURISDICTION

The order of the United States Court of Appeals was entered on August 8, 1977. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Whether the fact that once evidence is "tainted" is the government precluded from using the defendant-appellant's compelled testimony and if so, should the indictment obtained thereon be dismissed?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendments V and XIV.

STATEMENT OF THE CASE

The conviction against the defendant Anzalone arose from a series of incidents of vandalism and arson directed against a black family that intended to move into a house on the block where petitioner resided. A Richmond County Grand Jury was convened to investigate the arson.

The petitioner testified before said Grand Jury on April 18, 1973. At that time Anzalone received transactional immunity from state prosecution.

Thereafter, Anzalone was called to testify before a Federal Grand Jury for the Eastern District of New York on April 29, 1975, at which time he was given use immunity. It should be noted that the petitioner testified under a grant of use immunity pursuant to 18 U.S.C. Sec. 6002 before the same Federal Grand Jury that later indicted him.

At the trial the defendant was convicted of violating 42 U.S.C. Sec. 3631 (Fair Housing Law) and 18 U.S.C. Sec. 1623 (making false declarations before a Grand Jury). The Court of Appeals reversed the decision of the trial court on 42 U.S.C. Sec. 3631 and affirmed the decision of the Court below on 18 U.S.C. Sec. 1623.

REASONS FOR ALLOWANCE OF THE WRIT

This application for a writ of certiorari raises several substantial constitutional issues which include that once evidence is "tainted" and thereafter used by the Government, any indictment obtained thereon must be dismissed; improper use of defendant-petitioner's compelled testimony and violation of defendant-petitioner's constitutional rights.

It is clear that the judges of the Circuit Court found that the Government used the immunized testimony of Anzalone before the same Grand Jury that indicted the petitioner. The Court in an opinion by Judge Gurfein held:

> "It is, accordingly, the rule of the circuit that when as here, the same Grand Jury that heard the immunized testimony indicts the defendants, the conviction must be reversed and the indictment dismissed, with respect to substantive offenses. We must therefore reluctantly reverse the conviction of both appellants on all but the false declaration counts." *Id.* at p. 3394 (Appendix A).

The Court then went on to consider the exact same state of facts with reference to the false declaration counts. The Court then held:

> "We hold that the grant of immunity did not protect the grantee against the false declarations he knowingly made under the federal immunity grant, and that the proper body to determine whether the declarations made were, in fact false was the trial jury. By its verdict, it established that the declarations were false and, hence, outside the immunity conferred." *Id at p. 3394*. (Appendix A.)

It is respectfully submitted that this bifurcation of the rule in *U.S.v. Kurzer*, 534 F. 2d 511 (CA 2d Cir. 1976) is unfair and in violation of the constitutional rights of the petitioner. It is respectfully submitted that a true interpretation of the *Kurzer* rule, *supra*, is that once evidence is "tainted" and thereafter used by the Government, any indictment obtained thereon must be dismissed. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964).

The pre-trial affidavits submitted by the United States Attorney's office make it clear that every U.S. Attorney who had anything to do with the prosecution of the within case had access to the minutes of the immunized testimony. To find that:

> "No evidence was derived either directly or derivatively from the state grand jury testimony." *Id. at p. 3398.* (Appendix A.)

as the Circuit Court did in the case at bar, is to ignore all of the evidence adduced at the post trial evidentiary hearing held on June 15 and July 15, 1976 before the trial judge.

Considering all the foregoing, the fact that there was indeed "taint" attached to the indictment by reason of the Government's use of the immunized State Grand Jury testimony and the Federal Grand Jury Testimony of the Petitioner a substantial constitutional question exists under the 5th and 14th Amendments to the U.S. Constitution, deserving of this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 14, 1977.

Respectfully submitted.

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APPENDIX A

OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT FROM TRIAL BEFORE HON. EDWARD HEAHER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 650, 780—September Term, 1976
(Argued February 7, 1977—Decided May 6, 1977.)
Docket Nos. 76-1458, 76-1461

UNITED STATES OF AMERICA,

Appellee,

-against-

ALBERT ANZALONE and ANTHONY VIVELO,

Appellants.

Before:

FEINBERG, GURFEIN and MESKILL,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, after a trial before the Hon. Edward Neaher, *District Judge,* and a jury, convicting both appellants of violations of 42 U.S.C. Sec. 3631 and 18 U.S.C. Sec. 1623; and convicting one appellant of a violation of 18 U.S.C. Sec. 241.

Judgments of conviction on false declaration counts are affirmed; judgments of conviction on other counts reversed, and indictments thereon ordered dismissed.

HARVEY L. GREENBERG, New York, N.Y. (Michael S. Washor, Brooklyn, N.Y., of counsel), *for Appellant Anzalone.*

MICHAEL P. DIRENZO, New York, N.Y., *for Appellant Vivelo.*

RONALD E. DE PETRIS, Assistant United States Attorney, Eastern District of New York [David G. Trager, United States Attorney, and Bernard J. Fried, Assistant United States Attorney, Eastern District of New York, of counsel], for Appellee.

GURFEIN, *Circuit Judge:*

These convictions arose from a series of incidents of vandalism and arson directed against a black family that intended to move into a house, 351 Milton Avenue, Staten Island, on the block on which the appellants reside. The home of the new black neighbors was subjected to hostile acts ranging from shooting out the front windows and splashing paint on the front door to an attempt to burn it down. A Richmond County grand jury was convened to investigate the arson. Appellant Anzalone testified before that grand jury under a grant of transactional immunity against state prosecution. The state grand jury did not succeed in finding the perpetrators. The federal government then took a hand and a federal grand jury ultimately indicted the two appellants, Albert Anzalone and Anthony Vivelo, as well as two others, for violation of the civil rights of the black family and for making false declarations before the federal grand jury.

Both appellants were convicted by a jury of a violation of 42 U.S.C. Sec. 3631 (Fair Housing Law) which prohibits intimidating persons from occupying a dwelling because of their race or color. Vivelo was also convicted of a violation of 18 U.S.C. Sec. 241—the civil rights conspiracy statute. In addition, both appellants were convicted of making false declarations before a grand jury in violation of 18 U.S.C. Sec. 1623. Judge Neaher sentenced Anzalone to imprisonment for one year on the substantive civil rights count and for one year on the false declaration count on which he was convicted, the terms to run concurrently. Vivelo was sentenced to eighteen months' imprisonment on the conspiracy count, imprisonment of one year on the civil rights substantive count, and one year on the false declaration count on which he was convicted, the terms to run concurrently.

There is no claim that there was insufficient evidence to prove their guilt beyond a reasonable doubt, nor is any claim of error asserted with respect to the court's charge.

I.

Both appellants testified under a grant of use immunity pursuant to 18 U.S.C. Sec. 6002 before the very federal grand jury which indicted them. The claim now is that it was a violation of *Kastigar v. United States*, 406 U.S. 441 (1972), for the *same* federal grand jury which heard their immunized testimony to indict them. We so held in *United States v. Hinton*, 543 F. 2d 1002 (2d Cir. 1976), with respect to a substantive offense which was not perjury. Appellants argue that the *Hinton* rule, which was announced after their indictment, is retroactive and that it applies not only to require the dismissal of the substantive counts but also of the perjury and false declaration counts.

We turn first to the federal grand jury use immunity point. When an indictment is the product of the im-

munized testimony it must be dismissed so far as substantive offenses are concerned. *Kastigar, supra.* And we have recently held that "as a matter of fundamental fairness, a Government practice of using the same jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced." *United States v. Hinton,* 543 F. 2d 1002, 1010 (1976). In that case we reversed and ordered the dismissal of the indictment. The *Hinton* case involved a substantive count as noted.

Since we there discussed the problem of using the "same grand jury" in terms of "fundamental fairness" and since the pervasive vice is that the same grand jury could not help but "use" the immunized testimony in reaching its result, we are not prepared to say that the decision was only prospective in operation. The essential unfairness of "using" that which may not be "used" predated the actual exercise of our supervisory power, and trenches upon the constitutionally impermissible as defined in *Kastigar, see* 406 U.S. at 453. It is, accordingly, the rule of the circuit that when, as here, the *same* grand jury that heard the immunized testimony indicts the defendants, the conviction must be reversed and the indictment dismissed, with respect to substantive offenses. We must therefore reluctantly reverse the convictions of both appellants on all but the false declaration counts.

Turning to the false declaration counts, the rule is, as 18 U.S.C. Sec. 6002 itself provides, that false testimony given under use immunity in the grand jury may nevertheless become the predicate for a perjury or false declaration charge. *Bryson v. United States.* 396 U.S. 64 (1969); *Glickstein v. United States,* 222 U.S. 139 (1911); *see United States v. Housand,* slip op. No. 185, 1999, 2005 (2d Cir. Feb. 25, 1977). *Cf. United States v. Tramunti,* 500 F. 2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974).

Appellants counter that when they were indicted for making false statements before a grand jury, the statements themselves became the issue of fact to be ultimately determined at a trial. The implication is that they cannot be "false" until they are found to be so. In support of their view, they cite only *United States v. Kurzer,* 534 F. 2d 511 (2d Cir. 1976). But *Kurzer* says no such thing. There the issue was whether Kurzer's immunized testimony had motivated the principal prosecution witness to testify, *because* of what Kurzer had told the grand jury under the immunity grant. The Government argued that, in any event, Kurzer had forfeited all of his immunity by testifying falsely. Judge Feinberg rejected this contention, noting that "the ordinary remedy for the Government when an immunized witness lies . . . is a prosecution for perjury . . . rather than . . . use of the information truthfully given by the immunized witness to prosecute him for *other* offenses." 534 F. 2d at 518 (emphasis added). That is precisely what was done here when the appellants were indicted for making false declarations before a grand jury in violation of 18 U.S.C. Sec. 1623.

Appellants' argument is circular and self-defeating. Their argument simply amounts to this. A witness can never be *indicted* for perjury unless and until a petit jury has found him guilty of perjury. This would vitiate the *Glickstein* rule. *See* 18 U.S.C. Sec. 6002. This indictment clearly set forth as a predicate for the indictment the alleged perjurious answers given. The charge was that the defendant "did knowingly make" the false material declarations which were set out in the indictment with particularity.

We hold that the grant of immunity did not protect the grantee against the false declarations he knowingly made under the federal immunity grant, and that the proper body to determine whether the declarations made were, in

fact, false was the trial jury. By its verdict of guilty, it established that the declarations were false and, hence, outside the immunity conferred.

II.

The second claim, made by appellant Anzalone alone, relates to the state grand jury and the transactional immunity there conferred. He contends that the indictment should be dismissed because it was "tainted" by the Government's use of his immunized testimony before the state grand jury.

Anzalone testified before the Richmond County grand jury investigating the fire at 351 Milton Avenue under grant of transactional immunity against state prosecution. He contends that the indictment should be dismissed because of taint arising from the federal government's alleged *use* of that testimony in this prosecution. *Murphy v. Waterfront Commission*, 378 U.S. 52, 77-79 (1964). The "transactional" immunity granted by the state does not prevent federal prosecution for the same transaction. The rule is simply:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

378 U.S. at 79 n. 18[1]

1 *See also Kastigar, supra*, 406 U.S. at 457, where the Court drew from *Murphy* the conclusion that use immunity, without the grant of transactional immunity, satisfied the constitutional requirements of the Fifth Amendment.

With respect to the transactional immunity granted him by New York, Anzalone argues that the state grand jury minutes were turned over to the federal prosecutor and that the Government has failed to prove that it derived the evidence of his indictment from wholly independent sources as required by *Kastigar, supra*. Judge Neaher accordingly held a post-trial evidentiary hearing, after which he denied Anzalone's motion to dismiss the indictment which had been made before trial, based on alleged "taint.". Anzalone contends that the proof was insufficient to sustain the Government's burden of showing that it obtained its evidence against appellants from a wholly independent source.

In view of our holding that the substantive counts must be dismissed in any event, because the indictment was tainted, we need not consider this contention with regard to Anzalone's conviction on the substantive civil rights count.

With respect to the false declaration counts, it is possible to conceive a situation in which immunized testimony might be improperly used to obtain a perjury conviction. A situation might conceivably arise in which the defendant had told the truth in the state grand jury and lied in the federal grand jury. In such a case the question might be posed whether knowledge of the truth by the federal prosecutor gained from the immunized testimony had been used to support a federal false declarations indictment. *Cf. Cameron v. United States*, 231 U.S. 710 (1914).

However, we have no such question here. Anzalone was indicted on two false declaration counts, Counts Four and Nine. The false declarations charged in Count Four, on which Anzalone was convicted, related to appellant's denials that he had ever been involved in acts of vandalism against the premises at 351 Milton Avenue; and specifically, that he had ever shot a gun or seen anyone shoot a gun at the front windows of that house, or know the

identity of anyone who inflicted any kind of damage on those premises. Significantly, he was not asked about shooting a gun or anything related thereto in the state grand jury and no leads could possibly have been developed from that testimony which consisted of a wholesale denial of complicity.

The false declaration charge in Count Nine was limited to two questions concerning the night of the fire at 351 Milton Avenue as follows:

> "Q. After he left your house, called his wife, had a cup of coffee which you say is about one o'clock, after that time prior to the fire which took place at two o'clock or shortly thereafter, in that intervening time did Mr. Vivelo come over to your house again?
>
> "A. No.
>
> "Q. You are sure about that?
>
> "A. Positive."

Anzalone was acquitted on Count Nine. No evidence was derived, either directly or derivatively, from the state grand jury testimony. Judge Neaher, nevertheless, properly held an evidentiary hearing at which he recognized that the Government has the burden of showing that it derived its evidence from wholly independent sources. We have reviewed the testimony and affirm the District Court's finding that the Government has sustained that burden.

III.

Finally, both appellants contend that they are entitled to a new trial because FBI Agent Savadel, who had interviewed Gerard Maddalone, a principal prosecution witness, testified that he had destroyed his rough notes of the interview after dictating and proof-reading a report thereof; and that this was the practice of the FBI.

We said in *United State v. Terrell*, 474 F. 2d 872, 877 (2d Cir. 1973):

> "This court has several times held in varying contexts that the Jencks Act, 18 U.S.C. Sec. 3500, imposes no duty on the part of law enforcement officers to retain rough notes when their contents are incorporated into official records and they destroy the notes in good faith. *E.g.*, United States v. Covello, 410 F. 2d 536, 545 (2d Cir. 1968), cert. denied, 396 U.S. 879, 90 S. Ct. 150, 24 L. Ed. 2d 136 (1969) (good faith destruction does not require new trial); United States v. Jones, 360 F. 2d 92, 95 (2d Cir. 1966), cert. denied, 385 U.S. 1012, 87 S. Ct. 721, 17 L. Ed. 2d 549 (1967) (good faith destruction does not require striking agent's testimony). Here there was no suggestion or showing as in United States v. Lonardo, 350 F. 2d 523 (6th Cir. 1965), that the notes were deliberately destroyed on the eve of trial and were substantially different in content from the formal report."

We adhere to the view expressed in *Terrell*. There was no showing that the notes were destroyed with intent to keep them from the defendants. Nor do we think they would be likely *Brady* material, as was intimated in *United States v. Harrison*, 524 F. 2d 421, 429 (D.C. Cir. 1975), unless there is more of a showing that, notwithstanding the

existence of the typewritten report which was furnished to defendants, the handwritten notes would have been helpful to the defense. To protect itself against the day when the witness may claim that the typed summary (which is discoverable, *see United States v. Johnson*, 525 F. 2d 999, 1003, 1004 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976), was contrary to what he said, we think that the FBI would be well-advised, however, to retain the handwritten notes until the prosecution is terminated.

The conviction of Anzalone on Count Two is reversed and the indictment on that count is ordered dismissed; his conviction on Count Four is affirmed. The conviction of Vivelo on Counts One and Two is reversed, and the indictment on these counts is ordered dismissed; his conviction on Count Five is affirmed.

APPENDIX B

OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT GRANTING UNITED STATES' MOTION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 650, 780—September Term, 1976.
(Argued February 7, 1977—Decided May 6, 1977.)
Docket Nos. 76-1458, 76-1461
On Rehearing: Decided August 8, 1977

UNITED STATES OF AMERICA,
Appellee,

-against-

ALBERT ANZALONE and ANTHONY VIVELO,
Appellants.

Before:
FEINBERG, GURFEIN and MESKILL,
Circuit Judges.

HARVEY L. GREENBERG, New York, N.Y.
(Michael S. Washor, Brooklyn, N.Y., of counsel),
for Appellant Anzalone.

MICHAEL P. DIRENZO, New York, N.Y.,
for Appellant Vivelo.

RONALD F. DE PETRIS, Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney, and Bernard J. Fried, Assistant United States Attorney, Eastern District of New York, of counsel), *for Appellee.*

ON PETITION FOR REHEARING

GURFEIN, *Circuit Judge:*

The United States moves for rehearing. The rehearing is granted and we adhere to our earlier decision. We affirmed the conviction of each appellant on the false declaration counts and reversed on the convictions for violating the Fair Housing Law, 42 U.S.C. Sec. 3631, following *United States v. Hinton*, 543 F. 2d 1002 (2d Cir. 1976). As a result each appellant is under sentence of one year of imprisonment.

The government contends that appellants should not have the benefit of *Hinton*—which held that an indictment by the *same* grand jury that heard *immunized* testimony of a defendant must be dismissed—because appellants failed to move to dismiss the indictment before trial pursuant to Rule 12 of the Rules of Criminal Procedure. *Davis v. United States*, 411 U.S. 233 (1973). We have considered this contention and find it unpersuasive in the circumstances.

As the government concedes, the substance of the argument that proved to be the basis of the *Hinton* rule was made to the trial judge just before trial in the form of a motion for severance, as well as a motion to preclude. The invalidity of the procedure was directly argued before the

trial judge and he entertained consideration on the merits. It was put quite clearly by defense counsel:

> "What I am suggesting is that there should have been two separate Grand Jury proceedings, so that there would be no prejudicial spillover or taint."

The Court:

> "I understand that would seem to be one logical antidote or solution, but, nevertheless, it does raise the question of whether a Grand Jury simply because certain witnesses have been brought before it, now may not be—charge them for the crimes but only for the crime of perjury. And that doesn't strike me as having been the intent of Congress by any means but I am not prepared to expound on that. I think I *will consider the matter* but based on what I have seen of these transcripts, I don't think any hearing is necessary here. To me it's largely a legal question." (App. Appendix A 88) (emphasis added).

This colloquy occurred at the conclusion of the argument made on the day the case was called for trial, May 3, 1976, before a jury was impanelled. Therefore, had there been severance, for which there was time, there could have been a proper reindictment, after *Hinton* came down. This squares with the rationale of *Davis v. United States, supra. Hinton* was decided September 27, 1976. We think that the government's contention that the substance of the *Hinton* argument was called to the court's attention too late is hypertechnical. We do not find waiver here. In *Hinton* the motion to dismiss the indictment was made "at trial," 543 F. 2d at 1007. The *Hinton* court concluded "that the procedure the Government adopted here falls outside the

bounds of permissible prosecutorial conduct." We recognize that the Assistant U.S. Attorney in our case was conscious of the problem and that he told the Grand Jury "if [the witness] testifies under use immunity, you should not use his testimony against him when you consider and vote on a bill, an indictment alleging a civil rights violation." This, however, is precisely what the *Hinton* court held was not sufficient and that is the law of the Circuit.

The government contends that since the *Hinton* decision came down after this indictment the rule of that case should not be applied retroactively. We think that since the vice here was similar to that in *Hinton* we are not merely applying a retroactive rule, but rather are applying the same logic to a similar state of facts, as we might well have done if *Hinton* had never been decided. We are particularly sorry to reverse a conviction for so despicable a crime, but the defect was called to the court's attention when it still would have been curable by a proper reindictment.[1]

1 Appellant Anzalone also petitions for rehearing of that portion of the panel opinion affirming his conviction under 18 U.S.C. Sec. 1623. The petition is denied.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of October, one thousand nine hundred and seventy-seven.

76-1458 — 76-1461

United States of America,
Plaintiff-Appellee,

v.

Albert Anzalone, Anthony Vivelo,
Nicholas Lombardi, Robert Barbieri,
Defendants,

Albert Anzalone, Anthony Vivelo,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/Irving R. Kaufman
Chief Judge